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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/762,347	07/13/2001	Dell 'Eva Marcello	(H)99GU1341U	3573

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08/05/2004

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EXAMINER
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PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/762,347

Applicant(s)

MARCELLO, DELL 'EVA

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 09 July 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-10, 12-14 and 16-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10, 12-14, 16-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

Claim 7 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 7 recites the limitation "'first liquid to salt or sugar etc. are about....by weight'" in lines 2 and 3. There is insufficient antecedent basis for this limitation in claim 1.

Claim 1 and 19 are also indefinite in the use of the ratio from 100:20 to 300. It is not known whether the ratio is incomplete or applicant intends the oil to be used in parts of 20 to 300.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-10, 12-14, 16-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lynn (3,697,290).

Lynn discloses a process of making a food product by combining chopped sesame seeds, oil and salt and then acid is added and the composition is mixed (col. 4, lines 3-29 and col. 6, lines 30-45). Claim 1 differs from the reference in the amount of acidulant which is enough to obtain a firmer consistency. However, acids are known to cause coagulation of protein materials, which increases the consistency of a substance. For instance, adding acid to a milk mixture, which contains protein, will result in a

cheese product due to the coagulation of the milk. As no amounts are claimed, it is seen that the process is shown. Therefore, it would have been obvious to add an acid to a product as shown by the reference. Claims 1 and 19 further require a quantitative ratio of the first substance which is seeds or nuts to oil. The reference discloses the use of 35 to 50% oil in the composition and ground sesame in amounts of can be from 25-50% by weight. As the particular ingredients are known it would have been within the skill of the ordinary worker to use whatever amount of protein and oil necessary for the function of each of the ingredients. Therefore, it would have been obvious to use various amounts of ingredients in the claimed composition.

Claim 2 requires that the oil originate from seeds or nuts. The reference discloses the use of cottonseed oil. Therefore, it would have been obvious to add an oil from seeds or nuts.

Claim 3 further requires that the seeds or nuts originate from a single plant species and claim 4 that the seeds are sunflower seeds. The reference discloses only chopped sesame seeds in Ex. 1 (col. 6, lines 30-34). As to the use of sunflower seeds in claim 4, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a

patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to use a single plant species and to use other seeds than sesame seeds in the process of Lynn.

Claim 5 further requires that the first liquid can be produced from plants. Oil, of course is produced from the seeds of plants, such as corn and cotton. Therefore, it would have been obvious to use a liquid produced from plants as shown by the reference.

Claim 6 requires that the second liquid is lemon juice. The reference discloses the use of citric acid, which is a major acid in lemon juice. No patentable distinction is seen at this time in using lemon juice instead of citric acid. Therefore, it would have been obvious to use a material, which contains an acid.

The particular amount of salt and sugar, is seen to have been shown by the reference as is the oil as in claims 7, 8 and 9 (col. 6, lines 30-45). Therefore, it would have been obvious to add particular amounts of ingredients as shown by the reference.

The limitations of the product as in claims 10, 12 and 14 have been disclosed above and are obvious for these reasons. Giving a particular name to a composition does not give patentability to the product.

Claim 13 further requires that a perfuming substance is in the form of an herb or plant constituent. However, the reference discloses the use of caraway seeds which

are a plant constituent (col. 6, lines 30-34). Therefore, it would have been obvious to add an ingredient, which had a particular smell.

Claim 16 further require a granular constituent which is a coarsely ground ingredient. Lynn discloses the use of ground caraway seed (col. 6, lines 55-61). No patentable distinction is seen in the use of one seed as opposed to another, absent unobvious and unexpected results using the claimed seeds. Therefore, it would have been obvious to use other ground seeds in the composition in place of the sunflower seeds.

Claim 17 further requires that the consistency of the substance is determined by the amount of added acidic liquid or acidulant and claim 18 that the second substance is acidified by bacteria. However, the reference discloses that a mild acid is added to the non-elastic protein material (col. 8, lines 36-44). Additional water is added, but this is not seen to keep the acidulant from controlling the consistency, as the claim is an open, comprising claim, and water can be added to the composition. The use of acid producing bacteria is well known, as in Lactic acid producing bacteria, as in claim 18 and the liquid is still acid. No patentable distinction is seen at this time in using a liquid acidified by bacteria or one acidified by other acids absent a showing of new or unobvious results. Therefore, it would have been obvious to add acids produced by bacteria into the claimed composition to control the consistency.

The limitations of claim 19 have been discussed above and are obvious for those reasons. The ingredients of the reference are mixed together also. No limitation is seen in claim 20 that the product is not baked. Therefore, it would have been obvious to combine ingredients.

Claim 21 requires a pH of below 5. As acids are added to the above product, it would have been within the skill of the ordinary worker to acidify to particular degrees, in order to preserve the product. Therefore, it would have been obvious to acidify in the claimed process.

Claim 22 requires particular amounts of water. Ex. 4 discloses the use of 900 parts water which is within the claimed range. Therefore, it would have been obvious to use particular amounts of water as disclosed by the reference to Lynn.

Claim 23 further requires various amounts of acid to the second substance which is 2 to 20:100. However, it would have been within the skill of the ordinary worker to add various amounts of liquid to the claim compound knowing the function of acids as preservative. Therefore, it would have been obvious to use various amounts of acid to the claimed composition.

#### ARGUMENTS

Applicant's arguments filed 7-9-04 have been fully considered but they are not persuasive. Applicants argue that the new limitation as to fat, is not shown in the reference. However, the reference discloses amounts of fat within the claimed range. Nothing has been added to the claims to say that it is most likely an uncooked product. Basis would have to be provided for this limitation.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 7-31-04

  
**HELEN PRATT**  
**PRIMARY EXAMINER**